UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PRIDDIS MUSIC, INC.,

Plaintiff,

- against -

05-CV-0491
DNH/DRH

TRANS WORLD ENTERTAINMENT CORPORATION,

Defendant.

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(IN THE ORDER THAT THEY APPEAR IN THE MEMORANDUM OF LAW)

Date: June 3, 2005

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EXHIBIT 1

C
Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
CHENOWETH & FAULKNER, INC., Plaintiff,
v.
METRO MOBILE CTS, INC., Defendant.
No. 87 CIV. 6294 (MJL).

May 18, 1988.

Nixon, Hargrave, Devans & Doyle by Frank H. Penski, Vicki L. Safran, New York City, for plaintiff.

Olanoff & Kramer by Edward C. Kramer, Jeffrey S. Olanoff, Steven Tugentman, New York City.

OPINION AND ORDER

LOWE, District Judge.

*1 Plaintiff Chenoweth & Faulkner ("C & F") is an advertising and public relations company. Defendant Metro Mobile CTS ("Metro") is a cellular telephone company. This action arises out of the termination of the parties' business relationship. Presently before this Court is Metro's Motion to Dismiss C & F's Second, Fifth, Sixth, Seventh, Eighth and Ninth Causes of Action for failure to state a claim.

FACTS

In early 1984 Metro hired C & F to perform advertising and public relations services. Each media company that C & F arranged to buy advertising space from on behalf of Metro billed C & F. C & F paid the media companies directly, then billed Metro. C & F received a 15% commission from the media companies. C & F also billed Metro for its services at an hourly rate.

C & F submitted annual and monthly schedules to Metro outlining proposed media advertising contracts. One Metro approved these schedules, or made changes to them, C & F performed the necessary services. After these services were performed, and after C & F received invoices from the different media companies, C & F billed Metro.

On January 16, 1987 Metro sent a letter to C & F terminating their relationship effective January 31, 1987. Complaint at ¶ 10. By letter dated January 28, 1987 C & F demanded payment from Metro in the amount of $1,561,179.84. Complaint at ¶ 11. Metro subsequently paid C & F $180,044.03. Complaint at ¶ 12.

DISCUSSION

Second Cause of Action

Metro has moved to dismiss C & F's Second Cause of Action for failure to state a claim. In this Cause of Action C & F alleges the existence of an account stated. In its Complaint C & F states:

By accepting C & F's invoices without objection, by making partial payment and by other conduct, Metro Mobile has acknowledged the debt to C & F in the amount of its invoices.

Complaint at ¶ 20.

Under New York law, an account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them. The agreement is made with respect to the correctness of separate items composing the account and balance due, if any, in favor of one party or the other. *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff,* 638 F.Supp. 714, 719 (S.D.N.Y.1986). It is essentially the same as if a promissory note had been given for the balance. *Interman Industrial Products v. R.S.M. Electron Power,* 37 N.Y.2d 151, 153, 332 N.E.2d 859, 861, 371 N.Y.S.2d 675, 678 (1975).

While silence does not normally constitute agreement to the correctness of an account rendered, the factual situation may be such that in the absence of an objection within a reasonable time after the account is rendered, an implied account stated may be found. *Navimex v. Northern Ice,* 617 F.Supp. 103, 105 (S.D.N.Y.1984) (defendant's failure to object for five months to plaintiff's summary statement of account was unreasonable, and converted statement into account stated); *Interman Industrial Products* at 154, 332 N.E.2d at 861, 371 N.Y.S. at 678-79 (absent express ratification by defendant, even a failure by defendant to object prior to commencement of action will not necessarily constitute implied acquiescence); *see also W.R. Haughton Training Stables v. Miriam Farms,* 118 A.D.2d 639, 499 N.Y.S.2d 792, 793 (1986) (period between summer and late November deemed reasonable time for defendant to object to its obligation to pay amounts billed by plaintiff, and prevented such billings from becoming an account stated).

Partial payment may be considered acknowledgment of the validity of an account rendered, thus converting it into an account stated. *Kramer, Levin, Nessen, Kamin & Frankel* at 720 (two partial payments against outstanding balance, along with nearly three years of silence, amounts to implied acceptance); *Chisholm-Ryder Co. v. Sommer & Sommer,* 70 A.D.2d 429, 431, 421 N.Y.S.2d 455, 457 (1979) (several months of acquiescence and two payments on account during the period of dispute, without questioning the balance, constitute implied agreement as to the whole).

*2 C & F submitted media schedules, invoices and aged receivables to Metro. These documents were submitted at different times over the period from July 1986 to February 1987. The Complaint is ambiguous as to whether these documents indicated that the amount due over this period was the same or whether such balances changed over time. It is also unclear from the Complaint which, if any, of these documents C & F intended to render to Metro as the account.

C & F does not allege that Metro explicitly or directly acknowledged any one of the receipts. Hence, absent Metro's assent to any one of these documents as the account stated, this Court can not arbitrarily choose one set of documents as the account rendered. Since the Complaint fails to set forth with sufficient particularity which document submitted by C & F to Metro is the account rendered, this Court would be unable to determine if the account rendered has been converted into an account stated by Metro's partial payment and/or Metro's silence. C & F has failed to state a claim for an account stated. This Court, therefore, grants Metro's Motion to Dismiss C & F's Second Cause of Action.

Fifth Cause of Action

Metro has moved to dismiss C & F's Fifth Cause of Action for failure to state a claim. This Cause of Action alleges breach of an implied contract. In its Complaint C & F states:

The abrupt termination wrecked havoc with the internal operation of C & F as C & F was not afforded an opportunity to effectively manage the necessary reductions in staff and other costs. Accordingly, C & F incurred expenses that adequate notice would have avoided.

Complaint at ¶¶ 33, 34.

When a contract contains express provisions regarding termination, these provisions will be binding upon the parties. In the absence of an express provision, a contract is terminable after a reasonable duration with reasonable notice. *Copy-Data Systems, Inc. v. Toshiba America Inc.,* 755 F.2d 293, 301 (2d Cir.1985). Even if no definite period of termination was originally fixed, the contract is not terminable at will by either party. *Colony Liquor Distributor, Inc. v. Jack Daniels Distillery,* 22 A.D.2d 247, 249, 254 N.Y.S.2d 547, 549 (1964). Rather, if the contract existed for a reasonable duration, then the plaintiff is entitled to reasonable notice of termination. *Id.* at 250, 254 N.Y.S.2d at 550. This reasonable notice doctrine is well established in New York law. *Creative*

Foods Corp. v. Chef San Francisco, 92 A.D.2d 462, 458 N.Y.S.2d 917 (1983); *Landow-Luzier Co. v. Grey,* 34 Misc 2d 1061, 232 N.Y.S.2d 247 (1962) .

In addition, a plaintiff claiming breach of implied contract must allege facts showing damage. *Calabria v. Associated Hospital Service,* 459 F.Supp. 946, 949 (S.D.N.Y.1978), *aff'd,* 610 F.2d 806 (2d Cir.1979); *Ryan Ready Mixed Concrete Corp. v. Coons,* 25 A.D.2d 530, 530, 267 N.Y.S.2d 627, 630 (1966).

***3** C & F properly alleges damages because it states that, due to the abrupt contract termination, it incurred expenses that adequate notice would have avoided. Complaint at ¶ 34. We must now decide whether the two week notice of termination given by Metro to C & F was reasonable as a matter of law. Considering the continuing and ongoing business relationship between Metro and C & F for more than two years, and considering the fact that C & F made arrangements with the media on behalf of Metro for periods far in excess of the two weeks' notice of termination given by Metro, this Court holds that the Complaint sufficiently states a claim for breach of implied contract. Therefore, Metro's Motion to Dismiss C & F's Fifth Cause of Action is denied.

Sixth Cause of Action

Metro has moved to dismiss C & F's Sixth Cause of Action for failure to state a claim. This Cause of Action alleges tortious interference with contractual relations. In its Complaint C & F states:

Metro Mobile, through its officers and agents, wrongfully, intentionally and maliciously persuaded the Media to breach their agreements with C & F.... The Media would not have breached but for the wrongful conduct of Metro.... Metro Mobile ... caused serious injury to C & F.

Complaint at ¶¶ 39-41.

To withstand a 12(b)(6) motion, a plaintiff bringing a tortious interference with contractual relations claim in New York must show each of the four elements that comprise such a claim: 1) the existence of a valid contract between plaintiff and a third party, 2) defendant's knowledge of such a contract, 3) defendant's intentional procurement of a breach of the contract by the third party, and 4) damages caused by the breach. *Universal City Studios v. Nintendo Co.,* 797 F.2d 70, 75 (2d Cir.1986); *GLM Corp. v. Klein,* 665 F.Supp. 283, 287 (S.D.N.Y.1987); *Printers II, Inc. v. Professional Publishing, Inc.,* 615 F.Supp. 767, 774 (S.D.N.Y.1985), *aff'd,* 784 F.2d 141, 147 (2d Cir.1986); *Israel v. Wood Dolson Co.,* 1 N.Y.2d 116, 134 N.E.2d 197, 151 N.Y.S.2d 1 (1956). Additionally, a plaintiff must show that, but for the unlawful actions of the defendant, the contract would have been performed. *GLM Corp.* at 287; *Demalco Ltd. v. Feltner,* 588 F.Supp. 1277, 1280 (S.D.N.Y.1984); *Bryce v. Wilde,* 39 A.D.2d 291, 293, 333 N.Y.S.2d 614, 616, *aff'd,* 31 N.Y.2d 882, 292 N.E.2d 320, 340 N.Y.S.2d 185 (1972).

C & F has adequately pleaded all the above-outlined elements except for the third one. On this element, C & F's claims amount to no more than unsubstantiated allegations or assertions that C & F was intentionally and unjustifiably interfered with. *Alvord & Swift v. Steward M. Muller Construction Co.,* 46 N.Y.2d 277, 282, 385 N.E.2d 1238, 1241, 413 N.Y.S.2d 309, 312 (1978). C & F cannot use conclusory language or vague allusions without stating in the Complaint whether or how the third party breached and whether or how Metro procured that breach. *Nordic Bank PLC v. The Trend Group,* 619 F.Supp. 542, 561 (S.D.N.Y.1985) ; *Robbins v. Ogden, Inc.,* 490 F.Supp. 801, 810 (S.D.N.Y.1980). C & F must allege that the third party relied on Metro and that Metro's motivation was exclusively malicious, as opposed to being based upon *bona fide* economic considerations. *Demalco v. Feltner,* 588 F.Supp. 1277, 1280 (S.D.N.Y.1984); *Strobl v. New York Mercantile Exchange,* 561 F.Supp. 737, 786 (S.D.N.Y.1983); *Sadowy v. Sony Corp. of America,* 496 F.Supp. 1071, 1080 (S.D.N.Y.1980); *Alvord & Swift* at 282, 385 N.E.2d at 1241, 309 N.Y.S.2d at 312.

C & F alleges in a conclusory fashion that Metro "wrongfully, intentionally and maliciously persuaded the media to breach their agreements with C & F and to accept payment directly from Metro." Complaint at ¶ 39. Absent in this bare allegation is any indication that Metro's motivation was exclusively malicious or without other lawful objectives such as economic considerations. In doing so, C & F failed to satisfy the third element of the tortious interference with contractual relations test, Metro's intentional procurement of a breach by the media. We therefore grant Metro's Motion to Dismiss C & F's Sixth Cause of Action.

Seventh and Ninth Causes of Action

***4** Metro has moved to dismiss C & F's Seventh and Ninth Causes of Action for failure to state a claim. These Causes of Action allege that Metro defamed C & F. In its Complaint C & F states:

Metro Mobile wrongfully questioned the business integrity of C & F [in front of McCaw Communications, Inc. ("McCaw"), a client].... with malice, without just cause or excuse, and with wrongful intent, injured C & F's business reputation.... Metro, through its officers and agents, falsely and without legal justification or excuse, stated that it had paid C & F for Magazine Networks, Inc.'s [("MNI") a client] bills, ... implying that C & F was not forwarding the payments to MNI.

Complaint at ¶¶ 46, 48, 56.

To withstand a 12(b)(6) motion, a plaintiff bringing a defamation claim must plead in one of two ways. The plaintiff may allege slander *per se.* In such a case the complainant does not have to plead special damages. *Sadowy v. Sony Corporation of America,* 496 F.Supp. 1071 (S.D.N.Y.1980). Rather, the plaintiff must only show that the statements would tend to injure him in his trade, office, occupation, business or profession. *Id.* at 1077; *see also Matherson v. Marchello,* 100 A.D.2d 233, 236, 473 N.Y.S.2d 998, 1001 (1984). If the plaintiff is unable to show slander *per se* then he must plead special damages. *Sadowy* at 1077. In the event that it is necessary to allege special damages, they must be fully and accurately identified with sufficient particularity to identify actual losses. *Sadowy* at 1075; *Matherson* at 1001, 473 N.Y.S.2d at 235. The use of round figures or a mere general allegation of losses is insufficient to satisfy the special damages requirement. *Matherson* at 1001, 473 N.Y.S.2d at 235. C & F alleges that statements made by officers and agents of Metro to clients of C & F, namely McCaw and MNI were slanderous *per se.*

In determining whether certain statements are actionable as slander *per se,* the weight of authority holds that the complaint must be detailed and informative enough to enable the defendant to respond. *Kelly v. Schmidberger,* 806 F.2d 44, 46 (2d Cir.1986); *Herbert v. Lando,* 603 F.Supp. 983, 990 (S.D.N.Y.1985). Furthermore, in drafting a sufficiently detailed and informative slander complaint, defamatory material should be pleaded with substantial accuracy. *Daniel P. Foster, P.C. v. Turner Broadcasting System,* (2d Cir. 1988);846 F.2d 955 *Fairley v. Peekskill Star Corp.,* 83 A.D.2d 294, 297, 445 N.Y.S.2d 156, 159 (1981); *Kelly v. CBS, Inc.,* 59 A.D.2d 686, 686-87, N.Y.S.2d 673, 674 (1977). This requirement insures that defendants are given adequate notice and are able to prepare responsive pleadings. *Schmidberger* at 46; *Herbert* at 990; *Liquori v. Alexander,* 495 F.Supp. 641, 647 (S.D.N.Y.1980). It is only upon a substantially accurate pleading of the alleged defamatory statements that a court will be able to decide whether the offending words are susceptible to a libelous meaning. *James v. Gannett Co.,* 40 N.Y.2d 415, 420, 353 N.E.2d 834, 837, 386 N.Y.S.2d 871, 874 (1976); *Tracy v. Newsday, Inc.,* 5 N.Y.2d 134, 136, 155 N.E.2d 853, 854, 182 N.Y.S.2d 1, 3 (1959).

In its Complaint, C & F properly alleges that it was injured by statements made by officers and agents of Metro to clients of C & F. However, C & F fails to identify any particular defamatory words used by Metro. Furthermore, C & F omits which officers and agents of Metro made the alleged statements and whom among their clients actually heard the alleged defamation. Absent such information Metro is unable to adequately defend itself. Hence, C & F has failed to satisfy the substantial accuracy requirement for a slander *per se* claim. This Court therefore grants Metro's Motion to Dismiss C & F's Seventh and Ninth Causes of Action.

Eighth Cause of Action

***5** Metro has moved to dismiss C & F's Eighth Cause of Action for failure to state a claim. This Cause of Action alleges tortious interference with prospective contractual advantage. In its Complaint C & F states:

C & F had favorably impressed McCaw ... and was being seriously considered by McCaw for a much larger role.... As a direct result of Metro Mobile's conduct, McCaw refuses to deal with C & F ... [and C & F] has lost profits that it would otherwise have obtained.

Complaint at ¶¶ 51-53.

To withstand a 12(b)(6) motion on a tortious interference with prospective contractual advantage claim, a plaintiff must show: 1) defendant's interference with business relations existing between plaintiff and a third party, 2) with the sole purpose of harming plaintiff or by means that are dishonest, unfair or in any other way improper. *PPX Enterprises v. Audiofidelity Enterprises,* 818 F.2d 266, 269 (2d Cir.1987). The plaintiff must also show that the defendant knew about the relationship between the plaintiff and the third party. *Id.* at 270. In addition, the plaintiff must set forth special damages with particularity, *Sbrocco v. Pacific Fruit, Inc.,* 565 F.Supp 15, 16 (S.D.N.Y.1983), or allege that the contract would have been completed but for the defendant's conduct, *Bunch v. Artec International,* 559 F.Supp. 961, 962 (S.D.N.Y.1983). If the defendant's interference is intended, even in part, to advance an interest of his own, then the interference will not support a claim of tortious interference with prospective contractual advantage unless the means employed by the defendant include criminal or fraudulent conduct. *PPX Enterprises* at 269.

These criteria have a long history in this district. *See Strapex v. Metaverpa,* 607 F.Supp. 1047, 1050 (S.D.N.Y.1985); *Martin Ice Cream v. Chipwich,* 554 F.Supp. 933, 945 (S.D.N.Y.1983); *Robbins* at 811.

C & F attempts to satisfy the requirement of showing that the contract would have been completed but for the defendant's conduct by alleging that "[a]s a direct result of Metro Mobile's conduct, ... C & F has lost profits that it would otherwise have obtained." Complaint at ¶ 53. However, earlier in its Complaint, C & F stated that it was "being seriously considered ... for a larger role" by McCaw. Complaint at ¶ 52. This second assertion falls far short of alleging that C & F had a contract with McCaw that *but for* Metro's actions would have been completed.

Further, even if we assume that Metro's conduct was the reason that C & F did not obtain additional business with McCaw, C & F has failed to satisfy the second prong of the *PPX Enterprises* test. C & F has failed to allege that Metro acted with the sole purpose of harming C & F or by means that were dishonest, unfair or in any other way improper. Hence, C & F has failed to state a cause of action for tortious interference with prospective contractual advantage. We therefore grant Metro's Motion to Dismiss C & F's Eighth Cause of Action.

CONCLUSION

***6** We grant Metro's Motion to Dismiss C & F's Second, Sixth, Seventh, Eighth and Ninth Causes of Action. We deny Metro's Motion to Dismiss C & F's Fifth Cause of Action. We grant C & F leave to file an amended complaint within thirty days from the date this Opinion is filed. The dismissed claims may only be revived if C & F can and does strictly comply with the requirements outlined herein.

It Is So Ordered.

1988 WL 52777 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT 2

C

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
MCI WORLDCOM COMMUNICATIONS, INC.
formerly known as Worldcom Technologies,
Inc., the successor in interest to WorldCom, Inc.,
Plaintiffs-Counterclaim
Defendant,
v.
NORTH AMERICAN COMMUNICATIONS
CONTROL, INC., Defendant-Counterclaim
Plaintiffs,
and
James MILANA, Thomas Milana, Sr., Len
Goldstein, Frank Caccamo, Gary Fragin,
Jack Gluck, Gruber & Heitner, Certified Public
Accountants, and Robert Gruber,
Additional Defendants.
No. 98 Civ.6818 LTS.

June 4, 2003.

Provider of telecommunications services sued customer, seeking payments of amounts due under contract. Customer moved to dismiss provider's claim that it was fraudulently induced to enter into credit adjustment agreement. The District Court, Swain, J., held that: (1) provider was not fraudulently induced to enter into agreement by promises to pay current and past due obligations and to release claims against provider, and (2) dismissal of fraud claim mandated dismissal of related conspiracy claim.

Motion granted.

West Headnotes

[1] Fraud 🔑24
184k24 Most Cited Cases

[1] Fraud 🔑32
184k32 Most Cited Cases
Provider of telecommunications services was not fraudulently induced to enter into credit adjustment agreement, under New York law, by customer's representations that customer would pay current monthly invoices on priority basis, would promptly pay back amounts due upon receipt of credits, and would release provider from any claims upon receipt of credits; representations involved future performance rather than constituting false statements regarding existing conditions, and fraudulent nonperformance of contract itself was involved rather than required fraud on matters extrinsic to contract.

[2] Conspiracy 🔑1.1
91k1.1 Most Cited Cases
Under New York law, provider of telecommunications services could not maintain claim that principals of customer conspired to wrongfully withhold payment from provider, following dismissal of underlying fraud claim to which conspiracy claim was connected.
Law Office of Richard I. Wolff, P.C., By: Richard I. Wolff, New York, NY, for Plaintiff.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, By: Thomas R. Manisero, New York, NY, for Defendants Gruber & Heitner, CPAs and Robert Gruber.

Hagan, Coury & Associates, By: Paul F. Corcoran, Brooklyn, NY, for Defendants James Milana, Thomas Milana, Sr. Frank Caccamo, Gary Fragin and Jack Gluck.

Levy Boonshoft & Spinelli, P.C., By Eric Gruber, New York, NY, for Defendant North American Communications Control, Inc.

OPINION AND ORDER

SWAIN, J.

*1 This litigation arises from a dispute concerning an agreement between Plaintiff MCI WorldCom Communications, Inc. ("WorldCom") and Defendant North American Communications Control, Inc. ("NACC") under which WorldCom provided long distance services to NACC, which, in turn, provided long distance services to its customers. WorldCom filed a complaint alleging breach of contract against NACC. Following commencement of discovery, WorldCom amended the complaint to add a fifth cause of action (the "Fifth Cause of Action") against NACC and certain individual shareholders and officers of NACC alleging fraudulent inducement, conspiracy and aiding and abetting claims. Defendants NACC, James Milana, Frank Caccamo, Jack Gluck, Thomas Milana, Sr., Gary Fragin, and Gruber & Heitner, CPAs, and Robert Gruber move to dismiss the Fifth Cause of Action pursuant Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure.

For the reasons set forth below, the motions of Defendants are granted in their entirety. [FN1]

FN1. Defendant Goldstein has not interposed a motion to dismiss. Accordingly, the Fifth Cause of Action is dismissed as to all Defendants other than Goldstein.

BACKGROUND

The following facts, which are alleged in the complaint, are taken as true for purposes of the motions to dismiss. WorldCom is a provider of long distance telephone services. NACC provides various forms of telecommunications services to it end-user customers. In or about the summer of 1994, WorldCom's predecessor in interest agreed provide telecommunications services to NACC. WorldCom billed NACC for these services on a billing system known as the Oracle System. Subsequently, the billing function for almost all services then being provided was transferred to a billing system known as the AS-400 System commencing with the invoice dated January 1, 1996 for the billing period commencing on December 1, 1995. Certain services then being provided were not transferred to the AS-400 System and continued to be billed on the Oracle System. (Complaint ¶ 18.)

At the time of the transfer of the billing function from the Oracle System to the AS-400 System, NACC's outstanding balances for all services previously provided was not transferred from the Oracle System to the AS-400 System, but remained on the Oracle System as separate accounts that were due and owing from NACC to WorldCom. (*Id.* ¶ 20.) WorldCom and NACC entered into a Rebiller Service Agreement on or about July 10, 1997 (the "Agreement"), whereby WorldCom agreed to provide certain designated telecommunications services, for which NACC agreed to pay specified rates and charges. (*Id.* ¶ 21.) The Agreement was amended on or about October 21, 1997. The Amendment reduced certain rates NACC was being charged pursuant to the Agreement (together, the Agreement and the Amendment will be referred to as the "Agreement"). (*Id.* ¶ 22.)

In November 1997, WorldCom resolved certain billing disputes with NACC by providing NACC with a "a package of credit adjustments for the NACC account" in the aggregate amount of $1,921,911 (the "Credit Adjustment Agreement"). (*Id.* ¶ 24.) Under the package, an amount of $1,296,554 was credited to NACC's outstanding balance on an invoice dated February 1, 1998, which had been billed on the AS-400 System, and an amount of $625,357 was applied to reduce NACC's balance billed on the Oracle billing system, reducing the amount owed on the Oracle system to $331,425. (*Id.* ¶ 25.) WorldCom and NACC agreed that the credit package fully addressed, resolved and satisfied all credits that were due NACC from the inception of the relationship up to the date of the Agreement, as well as all credits that were due NACC for the period from the date of the Agreement through October 30, 1997. (*Id.* ¶ 23.)

*2 The Agreement required NACC to meet certain minimum monthly commitments and not otherwise be in default of the Agreement before WorldCom applied a credit of $400,000 paid in two installments. (*Id.* ¶ 27.) In connection with the Agreement, WorldCom applied a credit to NACC's account in the amount of $400,000, which was included as part of the $1,296,554 credit in respect of the February 1, 1998 invoice. (*Id.* ¶ 28.) The Agreement also provided that NACC was to maintain at least $400,000 in monthly revenue. If NACC failed to maintain such revenue, NACC would be assessed a deficiency charge. (*Id.* ¶ 29.) In addition, under the Agreement, NACC agreed, unconditionally, to pay all undisputed charges billed within 30 days of the invoice. (*Id.* ¶¶ 30, 31.)

Commencing in May of 1998, at a time when NACC owed WorldCom in excess of $2,596,000 and was in material breach and default of its payment obligations pursuant to the Agreement, WorldCom gave NACC written notice demanding that it cure such breach by paying all monies that were then currently due and owing or suffer the termination of all services being provided. (*Id.* ¶ 33.) Negotiations between the parties failed to result in the payment of the demanded monies due and owing WorldCom, and NACC continued to refuse to cure such breach. In the latter part of August 1998, WorldCom began to terminate telecommunications services to NACC pursuant to the Agreement. The termination was substantially completed in September of 1998. (*Id.* ¶ 34.) After crediting NACC's account with all payments made and credits and adjustments given, NACC had an aggregate outstanding balance of $5,605,385 for services provided, consisting of $5,273,960 as evidenced by the invoice dated November 1, 1998, for the billing period commencing on October 1, 1998, and an amount of $331,425 that remained owing for telecommunication services billed on the Oracle System. (*Id.* ¶ 35.) Furthermore, as the result of NACC's breach of the Agreement, NACC also materially breached its continuing obligations under the section of Agreement requiring that NACC maintain specified monthly commitments. Therefore, NACC was liable for the return of the $400,00 credit previously applied by WorldCom. (*Id.* ¶ 36.)

In addition, as the result of WorldCom's termination of the Agreement based on NACC's default, NACC is obligated to pay WorldCom a deficiency charge for the unexpired portion of the term, which amounts to ten months, at the rate of $400,000 per month or $4,000,000 in the aggregate. NACC has failed and refused to do without any legal cause or justification. (*Id.* ¶ 37.)

The Fifth Cause of Action alleges that Defendants NACC, James Milana, Thomas Milana, Sr. ("Milana Sr."), Len Goldstein, Frank Caccamo, Gary Fragin, Jack Gluck, Gruber & Heitner, CPAs ("G & H"), and Robert Gruber conspired and to induce WorldCom to enter into the Agreement.

Defendants Milana, Milana Sr. and Goldstein were the original shareholders, officers and directors of NACC, with Milana being the President and owning 50% of the issued stock, Milana Sr. owning 30% of the issued stock, and Goldstein being the Chief Executive Officer and owing 20% of the issued stock. (*Id.* ¶ 59.) In or about January of 1996, Fragin and Gluck each purchased a 25% stock interest (50% in the aggregate) in NACC from its then existing shareholders for a purchase price of $1,000,000, of which Milana received $500,000, Milana Sr. received $300,000 and Goldstein received $200,000. (*Id.* ¶ 60.) Fragin had previously been a successful investment banker with many associates and contacts in the financial community and had been Gluck's business partner in a telecommunications company immediately prior to their purchase of a stock interest in NACC. (*Id.* ¶ 61.) Gluck had a personal and social relationship with Fragin and had been Fragin's business partner in a telecommunications company immediately prior to their purchase of stock in NACC. (*Id.* ¶ 62.) In or about January of 1996, Fragin loaned Gluck the $500,000 he used to purchase his 25% stock interest in NACC. (*Id.* ¶ 63.) Since January of 1996, Fragin has been the Chairman of the Board and a director of NACC and has become the largest owner of NACC stock (holding approximately 38% of the company's stock. (*Id.* ¶ 64.) Fragin also has approximately $2,000,000 of his personal funds invested in NACC, based on his purchases of NACC stock, loans made to NACC and the purchase of NACC debentures through a private placement that he arranged. (*Id.* ¶ 65.)

***3** Since January of 1996 Gluck has been a shareholder, officer (until sometime in 1997) and director of NACC and has received compensation as either an employee or consultant. (*Id.* ¶ 66.)

Goldstein was a shareholder, officer, director and employee of NACC until he left NACC's employ in approximately the latter part of 1997 or early 1998. (*Id.* ¶ 67.) Caccano was employed by NACC and was its Executive Vice President and is now its President. (*Id* . ¶ 68.) G & H prepared NACC's corporate tax returns and handled related financial information. (*Id.* ¶ 69.) Gruber was the partner in charge of NACC's account at G & H, and he provided financial/business advice to NACC. (*Id.* ¶ 70.) Milana, Caccamo and Goldstein (until he left NACC's employ) and Glock worked at NACC's offices, which are in the Southern District, on a daily basis and were fully informed and knowledgeable as to all material developments and events and day to day activities at NACC. (*Id.* ¶ 71.)

Fragin and Milana Sr. were kept fully informed and knowledgeable as to all material developments and events at NACC and were kept fully advised as to all material day to day operations and activities at NACC on a regular basis. (*Id.* ¶ 72.) Milana, Milana Sr., Goldstein (until he left NACC's employ), Caccamo, Fragin and Glock attended NACC Board of Directors meetings and or informal meetings in the Southern District of New York in connection with the business and operations of NACC. (*Id.* ¶ 73.) Milana, Milana Sr ., Goldstein (until he left NACC's employ), Fragin, Gluck and Caccamo were all of the shareholders, officers and directors of NACC. Milana is President, Goldstein is Chief Executive Officer, Caccamo is Executive Vice-President and Fragin is Chairman of the Board of NACC. (*Id.* ¶ 74.)

One of the main reasons that Fragin and Gluck invested in NACC was that, by increasing NACC's gross monthly revenues, they could sell NACC and/or the shareholders' stock interest in NACC to a third party at a very high multiple of NACC's gross monthly revenues and thereby make a huge personal profit. (*Id.* ¶ 77.) Gluck, Goldstein and Milana, with the knowledge and consent of the other shareholders, held discussions and negotiations in 1996, 1997 and 1998 with Total-Tel Communications, Inc. ("Total-Tel"), and other third-party companies, relating to the possible sale of NACC and/or the shareholders' stock interest in NACC at a negotiated multiple of NACC's gross monthly revenues. (*Id.* ¶ 78.) In or about September of 1996, when NACC was negotiating with Total-Tel for the sale of NACC and/or the shareholders' stock interest, NACC's shareholders considered 18 times gross monthly revenues a fair valuation of their NACC stock interest. (*Id.* ¶ 79.) Prior to the parties' entry into the Credit Adjustment Agreement, on or about July 10, 1997, WorldCom (or a predecessor entity) had been providing NACC with the overwhelming portion of its telecommunications services since the summer of 1994, pursuant to an oral agreement that had been amended from time to time. (*Id.* ¶ 80.) Before the parties entered into the Credit Adjustment Agreement, NACC had made irregular payments for services, resulting in WorldCom issuing demand and termination letters to NACC that threatened termination of services unless payment was made. NACC thereafter made its payments in order to continue receiving service. (*Id.* ¶ 81.)

***4** WorldCom also owed NACC credits for certain matters that arose prior to the parties' entry into the Credit Adjustment Agreement. The amount of NACC's past due obligations owed to WorldCom exceeded the aggregate amount of credits NACC was entitled to receive. (*Id.* ¶ 82.) During the negotiations leading up to the execution of the Credit Adjustment Agreement NACC, Milana, Milana Sr ., Caccamo, Goldstein, Fragin and Gluck, "acting singly and in concert conspiring together, knowingly and intentionally," entered into an unlawful scheme that they carried out in this jurisdiction. (*Id.* ¶ 83.) G & H and Gruber knowingly and intentionally joined in the continuing the conspiracy sometime before September 15, 1999, for the purpose of hiding and covering-up the unlawful and illegal acts of the conspirators and their obligations to pay WorldCom all monies due and owing. (*Id.* ¶ 84.)

Acting in conjunction with each other, NACC, Milana, Milana Sr., Caccamo, Goldstein, Fragin, Gluck, G & H and Gruber sought fraudulently to induce WorldCom to enter into the Agreement, and sought to have WorldCom continue to serve as the provider of NACC's telecommunications service requirements and to continue to extend credit to NACC. NACC resold these services to its end-user customers at substantial gross profit margins. NACC, however, had no intention of fully paying for the services provided by WorldCom. (*Id.* ¶ 86.)

The Defendants considered it critical to their plan to sell NACC and/or their stock interest in it, that WorldCom enter into the Agreement and continue to provide telecommunications services and to continue to extend credit to NACC, because WorldCom was a highly recognized national brand name that made its services widely acceptable to NACC's end-user customers in the markets that it was presently in and in those it was attempting to expand into. (*Id.* ¶ 87.) The individual Defendants sought to use WorldCom's national brand name and its wide acceptance by end-user customers to greatly increase NACC's gross monthly revenues in order to obtain the maximum price for the sale of NACC. (*Id.* ¶ 88.) NACC's end-user customers were almost all month to month customers who were free to leave NACC at any time if WorldCom discontinued service. If NACC lost customers, it would be unable to increase its gross monthly revenues in order to sell NACC at the maximum price. (*Id.* ¶ 89.) Milana, Goldstein and Gluck participated in the discussions and negotiations in this District with WorldCom's representatives, including its senior managers Jim Reilly ("Reilly") and John Callari ("Callari"). The discussions and negotiations resulted in the Agreement being entered into by WorldCom based on the co-conspirator's fraudulent statements and representations that were made to WorldCom as part of their preconceived plan to defraud WorldCom.

The co-conspirators represented: (i) that NACC would pay WorldCom's monthly invoices in full on a priority basis; (ii) that NACC would promptly pay WorldCom in full for all past due amounts that had accumulated on the Oracle and AS-400 Systems for services provided prior to the time of entering into the Agreement, upon the application by WorldCom to NACC's accounts of the credits that were due NACC from the inception of the relationship up to the time of the parties' entry into the Agreement; and (iii) that WorldCom's application of the $400,000 credit referred to in section 4 of the Agreement would release WorldCom from claims that had arisen prior to time of the parties' entry into the Agreement. (*Id.* ¶ 90.)

***5** These false and fraudulent statements and representations were made in the Southern District of New York by Milana, Goldstein and Gluck on behalf of all of the other Defendants and were known by each of them to be fraudulent at the time they were made. (*Id.* ¶ 91.)

When Milana, Goldstein and Gluck made the foregoing representations they knew full well that: (i) NACC never would make payment to WorldCom of its monthly invoices on a priority basis for the services provided under the Agreement; or (ii) make prompt payment in full to WorldCom of all past due amounts that had accumulated on the Oracle and AS-400 Systems for services provided prior to the time of entering into the Agreement, upon the application by WorldCom to NACC's accounts of the credits that were due NACC from the inception of the relationship up to the time of the parties entering into the Agreement, that were subsequently agreed upon and included as part of the credits in the aggregate amount of $1,875,667 incorporated in the Credit Adjustment Agreement; and (iii) that NACC never intended to abide by its statements and representations that WorldCom's application of the $400,000 credit, which was included as part of the subsequently agreed-upon credits in the aggregate amount of $1,875,667 incorporated in the Credit Adjustment Agreement, would release WorldCom from all claims of every type and kind that had arisen prior to the time of the parties' entry into the Agreement. (*Id.* ¶ 92.) To overcome WorldCom's reluctance to enter into the Agreement, the co-conspirators caused NACC make payments in the amount of $947,020 to partially reduce its then outstanding balance owed to WorldCom. (*Id.* ¶ 93.)

WorldCom's representatives did not know that Milana, Goldstein and Gluck had no intention of fully performing the promises made in connection with the Agreements at the time the promises were made. WorldCom's representatives believed Milana, Goldstein and Gluck's statements to be truthful at the time that they were made and WorldCom's representatives relied upon them. Thus, WorldCom was fraudulently induced to enter into the Agreement. (*Id.* ¶ 95.) If WorldCom had known that the statements and representations made by Milana, Goldstein and Gluck were false and were made with the undisclosed preconceived plan and intention of not fully performing them, WorldCom would not have entered into the Agreement. (*Id.* ¶ 96.)

Milana, Goldstein and Caccamo had discussions and negotiations with Reilly in this district wherein the parties agreed, after addressing all open credit issues, that the issuance of the credits in the aggregate amount of $1,875,667 as set forth in the Credit Adjustment Agreement was to fully resolve and satisfy all credits that were due NACC from the inception of the parties' relationship through October 30, 1997. WorldCom processed the agreed upon credits in connection with certain matters in the aggregate amount of $1,875,667 as incorporated in the Credit Adjustment Agreement. (*Id* . ¶ 98.) During the month of January 1998, WorldCom applied credits of $1,921,911 directly to NACC's accounts pursuant to the Credit Adjustment Agreement (which included a credit for an additional month's finance charge) by (i) applying a credit in the amount of $1,296,554 to NACC's invoice dated February, 1, 1998 for the billing period commencing on January 1, 1998 billed on the AS-400 System and (ii) applying a credit in the amount of $625,357 on the then-accumulated outstanding balance NACC owed WorldCom as billed on the Oracle System ($956,783), thereby reducing the current outstanding balance due and owing on the Oracle System to $331,125. (*Id.* ¶ 99.)

***6** Shortly after these credits were applied to NACC's accounts pursuant to the Credit Adjustment Agreement, WorldCom's representatives Reilly and Maritza Martin informed Milana and Caccamo at different times of the particulars and the specific manner in which the credits had been applied to NACC's accounts. (*Id.* ¶ 100.) NACC never challenged any of the particulars until after WorldCom sent its demand letter to NACC dated May 29, 1998. (*Id.* ¶ 101.)

Subsequently, Gluck was also advised by Reilly as to the particulars of the application of the $1,921,911 in credits to NACC's accounts pursuant to the Credit Adjustment Agreement. After the application of the $1,921,911 of credits to NACC's accounts in January of 1998, the co-conspirators immediately breached their representations that they would pay WorldCom's monthly invoices in full on a priority basis. NACC made no payments to WorldCom during the months of January, April, May, July and September of 1998 and made less than the required payments for the other months for the services then being provided. As a result, NACC's outstanding balance to WorldCom on the AS-400 System rose from $2,301,053 on the invoice dated February 1, 1998 (after the credit of $1,296,554 was applied) to $5,273,960 on the invoice dated November 1, 1998, by which time WorldCom had terminated substantially all services. (*Id* . ¶ 104.) After the application of the $1,921,911 of credits to NACC's accounts in January of 1998, the co-conspirators breached their representations to promptly pay all past due amounts in full that had accumulated on the Oracle and AS400 Systems for services provided prior to entering into the Agreement. (*Id.* ¶ 105.) The co-conspirators were using NACC's available cash, funds and resources that should have been used to pay WorldCom to pay off NACC's past due balances that had accumulated on the Oracle and AS-400 Systems for services provided prior to entering into the Agreement to pay to themselves and the many relatives of Fragin, Gluck, Milana, Milana Sr. and Caccamo who were on the payroll, excessive salaries, consulting fees, commissions, reimbursements and other forms of compensation and to make major capital asset purchases in excess of $1,000,000. (*Id.* ¶ 106.)

WorldCom sent NACC a demand and termination letter dated May 29, 1998 stating in substance that, unless its "past due balance of $2,596,350.00" was paid by June 4, 1998 all services would be terminated. (*Id.* ¶ 107.) After NACC's receipt of WorldCom's demand and termination letter dated May 29, 1998, Gluck, Milana and Caccamo on behalf of all the co-conspirators entered into a plan to transfer NAAC's customers from WorldCom's services to those of other providers as NACC did not have the available cash, funds or resources to pay WorldCom the monies due and owing for the telecommunications services provided pursuant to the Agreement. (*Id.* ¶ 108.) Gluck and Milana continued to attempt to sell NACC to Total-Tel in the Summer of 1998. The negotiations did not proceed after Total-Tel insisted that the proceeds of any sale by the then current shareholders (*i.e.* Fragin, Gluck, Milana and Milana Sr.) would have to be held in escrow pending a resolution of WorldCom's claims for monies due and owing. (*Id.* ¶ 109.)

*7 Gluck, Milana and Caccamo raised numerous illusory issues for the purpose of delaying WorldCom's termination of the services it was providing pursuant to the Agreement as Amended, including their contention, for the first time, that NACC did not receive all of the $1,875,667 in credits referred to in the November 20, 1997 Memorandum. (*Id.* ¶ 110.) On August 7, 1998, WorldCom sent another demand and termination letter to NACC, stating that unless "the entire balance due of $4,588,908.05, less any documented disputes" was received by August 13, 1998, all services would be terminated. (*Id.* ¶ 111.)

Thereafter, Milana delivered a letter to WorldCom dated August 21, 1998 which stated, in part, that: "With reference to our conversations concerning the outstanding balance NACC owes to WorldCom, please note that we are willing to forward to you the sum of $250,000.00 on a weekly basis until this outstanding balance is satisfied. We will also remain current on our August invoice and plan to continue to do so going forward." By letter dated August 26, 1998, Reilly wrote Milana a letter in which after addressing various open issues he states: "This leaves the outstanding undisputed balance at $3,983,963.70." (*Id.* ¶ 113.) In response to Reilly's letter, and contradicting Milana's earlier promise to make $250,000 weekly payments "until the outstanding balance is satisfied", NACC's attorneys wrote WorldCom on August 28, 1998 stating that NACC "is willing to transfer to WorldCom the $296,322.00 which is not in dispute." This payment by NACC was never made. (*Id.* ¶ 114.)

After negotiations between WorldCom and NACC did not result in the payment of the demanded monies that were owing, WorldCom in the latter part of August 1998 began to terminate providing all telecommunications services to NACC pursuant to the Agreement as Amended, which termination was substantially completed in September of 1998. (*Id.* ¶ 115.) On NACC's December 31, 1998 year-end Financial Statement, it lists under "Current Liabilities" that WorldCom is owed "$3,722,191.37." (*Id.* ¶ 116.) On NACC's revised December 31, 1998 year-end Financial Statement, even though certain other unrelated entries were changed, it still lists under "Current Liabilities" that WorldCom is owed "$3,722,191.37." (*Id.* ¶ 117.) On NACC's December 31, 1999 year-end Financial Statement it continues to list under "Current Liabilities" that WorldCom is owed "$3,722,191.37." (*Id.* ¶ 118.)

All of the individual Defendants, including G & H and Gruber, were fully familiar with and aware of the continuing specific reference to WorldCom being owed $3,722,191.37 in NACC's Financial Statements and never caused any restatement or change to be made. G & H and Gruber knowingly and intentionally joined and fully participated in the continuing unlawful and illegal conspiracy, and became co-conspirators sometime before September 15, 1999, which was the latest date by law that NACC had to file its Corporation Income Tax Return for the calendar year 1998 ("1998 Tax Return"). G & H and Gruber intentionally failed to timely file NACC's 1998 Tax Return and, permitted all lawful extensions that they had obtained for NACC to expire, because to file such return based on NACC's own documentation would establish that NACC owed WorldCom at least $3,722,191.37. (*Id.* ¶ 121.)

DISCUSSION

***8** [1] On a motion to dismiss for failure to state a claim, the Court should dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief. *See King v. Simpson,* 189 F.3d 284, 286 (2d Cir.1999); *Bernheim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996). The Court must confine its consideration "to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F. v. Israel Discount Bank of N.Y.,* 199 F.3d 99, 107 (2d Cir.1999); *Hayden v. County of Nassau,* 180 F.3d 42, 54 (2d Cir.1999). The Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Koppel v. 4987 Corp.,* 167 F.3d 125, 127 (2d Cir.1999); *Jaghory v. New York State Dep't of Educ.,* 131 F.3d 326, 329 (2d Cir.1997). The issue to consider is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *See Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir.1995). Indeed, it is not the Court's function to weigh the evidence that might be presented at trial; instead, the Court must merely determine whether the complaint itself is legally sufficient. *Id.*

______________ To succeed on a fraudulent misrepresentation claim under New York law, which the parties agree governs WorldCom's fraud claim, a plaintiff must show "(1) that [the defendants] made a misrepresentation (2) as to a material fact (3) which was false (4) and known to be false by [the defendants] (5) that was made for the purpose of inducing [the plaintiff] to rely on it (6) that [the plaintiff] rightfully did so rely (7) in ignorance of its falsity (8) to his injury." *Cohen v. Koenig,* 25 F.3d 1168, 1172 (2d Cir.1994) (quoting *Murray v. Xerox Corp.,* 811 F.2d 118, 121 (2d Cir.1987)).

Failure to fulfill a promise to perform future acts, however, is not a ground for a fraud action unless there existed an intent not to perform at the time the promise was made. *Cohen v. Koenig,* 25 F.3d at 1172; *see also Triangle Underwriters. Inc. v. Honeywell, Inc.,* 604 F.2d 737, 747 (2d Cir.1979) (plaintiff not allowed to "dress up" breach of contract claim as a fraud claim). Under New York law, it is well established "that a fraud claim cannot be based on solely the failure to perform a contractual promise.... The mere fact that plaintiff alleges that defendant never intended to honor the contractual obligations does not transform a contract claim into a claim of fraud." *Rotter v. Institutional Brokerage Corp.,* 1994 WL 389083, at *3 (S.D.N.Y. July 22, 1994). "A plaintiff sufficiently states a claim upon which relief may be granted only when it alleges fraud that is extraneous to the contract, rather than merely fraudulent non-performance of the contract itself." *Todi Exports v. Amrav Sportswear Inc.,* No. 95 Civ. 6701, 1997 WL 61063 at *2 (S.D.N.Y. Feb.13, 1997) (citing *Triangle Underwriters, Inc. v. Honeywell, Inc.,* 604 F.2d at 746-47.); *see also Bridgestone/Firestone, Inc. v. Recovery Credit Services. Inc.* 98 F.3d 13, 20 (2d Cir.1996) (plaintiff must show a fraudulent misrepresentation or breach collateral or extraneous to the contract). The Court finds that the misrepresentations alleged in the Fifth Cause of Action are not sufficiently collateral or extraneous to the Agreement to support a claim for fraudulent inducement.

***9** WorldCom contends that the alleged misrepresentations in the Fifth Cause of Action are collateral to the Agreement entered into between WorldCom and NACC simply because the misrepresentations are not contained in the Agreement. The Court disagrees. Where courts have found viable fraud claims based on fraudulent misrepresentation, the statements concerned matters separate and distinct from the subject matter of the contract. For example, in *Cohen v. Koenig,* 25 F.3d 1168, the representations at issue supporting a fraudulent inducement claim concerned defendant's overstatements of their net income and the value of the current assets and property. The misrepresentations as to defendant's financial condition were material misrepresentations extrinsic to plaintiff's agreement to extend credit to defendants and which induced plaintiffs to extend credit to the defendants. *Cohen,* 25 F.3d at 1172-73. In *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.,* 68 N.Y.2d 954, 956, 510 N.Y.S.2d 88, 502 N.E.2d 1003 (1986), defendants made representations concerning geographic restrictions limiting product resales that were not contained in the contract, but which were not contradicted by the contract. The court held that the parol representations were "collateral or extrinsic" to the contract, and were thus enforceable. The sellers in *Chase v. Columbia Nat'l Corp.,* 832 F.Supp. 654, 660 (S.D.N.Y.1993), *aff'd,* 52 F.3d 312 (2d Cir.1995), overstated the book value of the business being sold by overstating and double-counting closing inventory of scrap metal and accounts receivable in a manner that made their fraud difficult to detect. The contract provided that the sellers guaranteed the business' net worth, and limited damages to the reduced net worth, or indemnification of the buyer's loss. The court found that these representations were collateral and extraneous to the representations provided by the contract, thus justifying the action for fraud.

The misrepresentations alleged here, by contrast, are closely related to the subject matter of the contract and concern representations of future intent, not a separate, present fact. *See Deerfield Communications, Corp.* 510 N.Y.S.2d at 89, 502 N.E.2d 1003. (misrepresentation of present fact, not future intent may be actionable as a fraud claim). The Fifth Cause of Action alleges the following misrepresentations:

> That NACC would pay WorldCom's monthly invoices in full on a priority basis for the telecommunications provided pursuant to the Agreement;
> that NACC would promptly pay WorldCom in full for all past due amounts that had accumulated on the Oracle and AS-400 Systems for services provided prior to the time of entering into the Agreement, upon the application by WorldCom to NACC's accounts of the credits that were due NACC from the inception of the relationship up to the time of the parties entering into the Agreement; and
> that WorldCom's application of the $400,000 credit referred to in Section 4 of the Agreement would release WorldCom from all claims of every type and kind that had arisen prior to the time of the parties entering into the Agreement.

***10** (Complaint ¶ 90.)

The Agreement provides, in pertinent part, that: "WorldCom will bill the Customer for the Service ... on a monthly basis. [NACC] will pay all charges billed by WorldCom within thirty ... days...." Agreement, Article 6. Paragraph 6.3 of the Agreement provides: "Customer's obligation to pay all undisputed charges billed by WorldCom is absolute and unconditional under any and all circumstances."

Misrepresenting whether NACC would pay WorldCom's invoices in full on a priority basis is not a misrepresentation of a present, material existing fact, nor is it a representation that is collateral or extraneous to the agreement. First, the representation concerning priority payment on its face concerns a promise of future performance. Second, payment of the WorldCom invoices in full is the subject of Article 6 of the Agreement. The alleged misrepresentation concerning priority payment is not sufficiently collateral or extraneous to the Agreement to support a cause of action for fraud.

The representation concerning whether NACC would pay WorldCom past due amounts upon WorldCom's granting credits NACC likewise is not a misrepresentation of a present fact, but depends upon WorldCom's applying future credits to NACC's accounts. Whether WorldCom has properly credited NACC's accounts is a matter of dispute in this case. The issue of WorldCom's credits to NACC's accounts and NACC's payment of past-due amounts is the subject matter of Credit Adjustment Agreement entered into by WorldCom and NACC. Thus, the representation concerning

NACC's payment of past due amounts upon WorldCom's application of credits to NACC is not collateral or extraneous to promises made in the Agreement or the amendments thereto.

The representation concerning the $400,000 credit also is not collateral to the Agreement. Article 4 of the Agreement provides for the application of the $400,000 credit to NACC. WorldCom asserts that the Defendants represented that the $400,000 credit in the Agreement was in consideration of a release of all claims against WorldCom arising prior to the Agreement. (Complaint ¶ 27.) These alleged misrepresentations do not concern false representations regarding a present fact separate from the Agreement, but concern the operation of the Agreement itself.

The cases cited by WorldCom in support of its position do not help Plaintiff. In *Kelly v. MD Buyline, Inc.*, 2 F.Supp.2d 420, 434-35 (S.D.N.Y.1998), the collateral misrepresentation at issue concerned a promise to pay attorneys' fees without interruption in return for a reduction in those fees was not made in connection with the original retainer agreement which was the subject of the plaintiff attorneys' breach of contract claim, but was made subsequent to the retainer agreement. In *Blank v. Baronowski,* 959 F.Supp. 172, 180 (S.D.N.Y.1997), defendant entered into an oral joint venture agreement in which defendant promised that plaintiff was defendant's partner and that plaintiff would receive certain compensation arising from the acquisition of a company. Defendant made statements as to the existence of the joint venture subsequently to induce plaintiff to extend credit. In determining that plaintiff had a fraud claim against defendant, the district court found that the statements concerning the existence of the joint venture were sufficiently collateral because the fraudulent statements were made after its formation. *Id.* In *Bell Sports v. System Software Associates,* 71 F.Supp.2d 121, 127 (E.D.N.Y.1999), the court determined that the misrepresentations underlying a fraud claim were made in an agreement separate from the contract at issue.

***11** Here, the Defendants' statements concerning NACC's promise to pay monthly invoices, past due amounts, and the release of claims against WorldCom in return for the $400,000 credit, do not concern statements made subsequent to the Agreement, or matters collateral and extraneous to the subject matter of the Agreement. *See Hargrave v. Oki Nursury, Inc.*, 636 F.2d 897, 898-99 (2d Cir.1980) ("If the only interest at stake is that of holding the defendants to a promise, the courts have said that plaintiff may not transmogrify the contract claim into one for tort.").

Because the Fifth Cause of Action alleges misrepresentations that are not collateral or extraneous to the Agreement, Plaintiffs have not stated a cause of action for fraudulent inducement against the Defendants.

Conspiracy

[2] The Fifth Cause of Action in the Third Amended Complaint further alleges that Defendants, including Milana Sr., Caccamo, Fragin, G & H and Gruber conspired to defraud WorldCom.

New York law does not recognize the substantive tort of civil conspiracy. *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank,* 755 F.2d 239, 251 (2d Cir.1985). Under New York law, " 'a mere conspiracy to commit a tort is never of itself a cause of action." ' *Sado v. Ellis,* 882 F.Supp. 1401, 1408 (S.D.N.Y.1995) (quoting *Alexander & Alexander v. Fritzen,* 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 547, 503 N.E.2d 102 (1986)). Rather, "[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander,* 68 N.Y.2d at 969, 510 N.Y.S.2d at 547, 503 N.E.2d 102; *see also Missigman v. USI Northeast, Inc.,* 131 F.Supp.2d 495, 517 (S.D.N.Y.2001) (under New York law, "a claim for civil conspiracy is available only if there is evidence of an underlying actionable tort").

Civil conspiracy requires (i) an agreement between two or more persons, (ii) an overt act, (iii) an intentional participation in the furtherance of a plan or purpose and (iv) resulting damage, and effectively subjects a defendant and his co-conspirators to joint and several liability for joint activity. *Kashi v. Gratsos,* 790 F.2d 1050, 1054-55 (2d Cir.1986).

Because the Fifth Cause of Action does not allege sufficiently a fraud claim, there is no underlying tort and WorldCom has no basis for asserting a claim of conspiracy against Defendants Milana Sr., Caccamo, Fragin, G & H and Gruber.

Aiding and Abetting

"To state a claim for aiding and abetting under New York law, a plaintiff must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Gabriel Capital, L.P. v. Natwest Finance, Inc.*, 94 F.Supp.2d 491, 511 (S.D.N.Y.2000) (citing *Nigerian National Petroleum Corp. v. Citibank, N.A.*, No. 98 Civ. 4960, 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999). As indicated, the Third Amended Complaint fails to state a fraud claim against any of the Defendants. Accordingly, there is no basis for WorldCom to assert a claim against any of the Defendants for aiding and abetting.

Rule 9(b)

***12** Because the Court has determined that WorldCom has not stated a cause of action for fraudulent inducement, the Court will not address the parties' arguments concerning Rule 9(b) of the Federal Rules of Civil Procedure.

CONCLUSION

Accordingly, because the Fifth Cause of Action fails to state a claim for fraudulent inducement, conspiracy or aiding and abetting it is hereby dismissed as against all Defendants other than Goldstein. [FN2] The Court shall enter an order herewith scheduling a pretrial conference in this case.

FN2. *See supra,* note 1.

SO ORDERED.

2003 WL 21279446 (S.D.N.Y.)

Motions, Pleadings and Filings (Back to top)

- 1:98CV06818 (Docket) (Sep. 25, 1998)

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EXHIBIT 3

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
PANDISC MUSIC CORPORATION and Streetbeat Records, Inc., Plaintiffs,
v.
RED DISTRIBUTION, LLC, Defendant.
No. 04 Civ. 9365(GEL).

March 18, 2005.

Steven E. Rosenfeld, Law Offices of Steven E. Rosenfeld, P.C., New York, New York for Plaintiffs Pandisc Music Corporation and Streetbeat Records, Inc.

Saul B. Shapiro, Michael D. Sant' Ambrogio, Patterson, Belknap, Webb & Tyler LLP, New York, New York for Defendant Red Distribution LLC.

OPINION AND ORDER

LYNCH, J.

***1** Plaintiffs, who are affiliated small record companies, sue their former distributor, defendant Red Distribution, LLC, charging that at the expiration of their distribution agreement, defendant destroyed quantities of plaintiffs' records that were still on hand, which under the agreement should have been returned to plaintiffs. The complaint alleges three causes of action, for breach of contract, conversion, and "negligent bailment." Defendant now moves to dismiss the latter two counts, on the ground that they are merely duplicative of the breach of contract claim. Although the Court is uncertain why this motion was thought worth the expense of making and resisting it at this stage of the litigation, the motion will be granted.

It is well established that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Spanierman Gallery, PSP v. Love,* No. 03 Civ. 3188(VM), 2003 WL 22480055, at *3 (S.D.N.Y. Oct. 31, 2003) (internal quotation marks and citations omitted). Causes of action for conversion, in particular, are subject to this rule. *Dervin Corp. v. Banco Bilbao Vizcaya Argentaria, S.A.,* No 03 Civ. 9141(PKL), 2004 WL 1933621, at *5 (S.D.N.Y. Aug. 30, 2004). A bailment is in any event a claim based in express or implied contract. *Mays v. New York, New Haven & Hartford R.R. Co.,* 97 N.Y.S.2d 909, 911 (App.Term.1950). Thus, plaintiffs' second and third causes of action are presumptively duplicative of their contract claim.

As plaintiffs correctly point out, the rule contains its own exception: separate tort claims may be maintained where they rest upon a "legal duty independent of the contract itself." *Spanierman,* 2003 WL 22480055, at *3. In this case, however, according to the allegations of plaintiffs' complaint, defendant's possession of plaintiffs' property was governed not by the independent duties owed by one citizen to another under general tort principles, but by a specific agreement negotiated between the parties. Defendant held the property with certain rights and obligations determined by contract. The contract specifically authorized defendant to destroy the property under certain circumstances (Distribution Agency Agreement, Compl. Ex. A, ¶ 5(c)), and specifically required defendant to comply with plaintiffs' directives to return or otherwise dispose of it under other circumstances. (*Id.* ¶¶ 5, 6.) Thus, whether defendant violated any duty to plaintiffs is governed by the contract, and the remedy for any such violation is an action for breach of that contract.

Plaintiffs attempt to avoid this result by arguing that the contract governed defendant's actions during its term, but that after expiration of the contract, defendant's duties were governed by independent tort principles. But by the plain terms of the parties' agreement, that is not so. The agreement states a term, during which a distribution arrangement between the parties exists. (*Id.* ¶ 1.) But the agreement also contains promises by defendant to take certain actions after the term expires, including specifically its obligations with respect to records remaining in its possession after the expiration of the term. (*Id.* ¶ 5(a), (f)--(h).) Thus, even after the expiration of the distribution term, defendant's rights and obligations in this regard continue to be governed by the agreement.

***2** Accordingly, plaintiffs' second and third causes of action are dismissed as duplicative.

SO ORDERED.

2005 WL 646216 (S.D.N.Y.)

Motions, Pleadings and Filings (Back to top)

- 1:04CV09365 (Docket) (Nov. 29, 2004)

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EXHIBIT 4

C

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
DERVIN CORP., Plaintiff,
v.
BANCO BILBAO VIZCAYA ARGENTARIA, S.A., Defendant.
No. 03 Civ. 9141(PKL).

Aug. 30, 2004.

Bryan L. Rozencwaig, New York, NY, for Plaintiff Dervin Corp.

Jonathan A. Willens, Jonathan A Willens, LLC, Brooklyn, NY, for Defendant Banco Bilbao Vizcaya Argentaria, S.A.

OPINION AND ORDER

LEISURE, J.

***1** Plaintiff, Dervin Corp. ("Dervin"), a resident and citizen of New Jersey, brings this diversity action against defendant, Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA"), a global financial company based in Spain that operates bank branches in New York, New York and Miami, Florida. Plaintiff seeks to recover $211,662.93 in interest payments, which allegedly accumulated on its account at defendant's New York branch between October 1999 and July of 2001. Defendant now moves to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and, in the alternative, for summary judgment pursuant to Rule 56.

BACKGROUND

The Complaint alleges that, in or about 1994, plaintiff opened a bank account at BBVA's New York branch. (Compl.¶ 7.) From 1994 to 1999 the account did not earn interest. (*Id.* ¶ 8.) Plaintiff claims, however, that in or about October 1999 it sought interest payments from BBVA on the account, which at that point contained large deposits, and that, in response, a BBVA employee named Juliette Portello offered to add interest payments to the account. (*Id.* ¶¶ 8-9, 15.) Plaintiff alleges that it accepted this offer and that "in consideration of and in reliance upon BBVA's offer of interest, Dervin kept its bank account with BBVA and ceased any exploration of other financial institutions or interest bearing vehicles." (*Id.* ¶¶ 16-17.) Thereafter, plaintiff claims that its account accumulated interest totaling $211,662.93 through July of 2001, at which point BBVA stopped paying interest and unilaterally removed $211,662.93 from the account. (*Id.* ¶¶ 10-11.) Plaintiff asserts that, in spite of its demands, BBVA has refused to return the $211,662.93, (*id.* ¶¶ 12-13), and that it is entitled to recover this money, plus interest, under five causes of action: Count I--Breach of Contract; Count II--Specific Performance; Count III--Misrepresentation; Count IV--Conversion; and Count V--Unjust Enrichment.

BBVA responds to the Complaint with the instant motion to dismiss and motion for summary judgment. In moving for dismissal pursuant to Rule 12(b)(6) plaintiff argues (1) that Counts I and II must be dismissed as a matter of law because the alleged offer to pay interest, even if it occurred, was unlawful under federal and state banking laws, which prohibit the payment of interest on demand deposits; (2) that Counts III and IV must be dismissed because they are duplicative of plaintiff's contract claims; and (3) that Count V must be dismissed because plaintiff had no legal right to the accrued interest. Alternatively, BBVA moves for summary judgment on the grounds that no offer to pay interest was, in fact, ever made to Dervin and that the interest was added to Dervin's account as the result of a clerical error.

As discussed below, in resolving the merits of defendant's motion to dismiss, the Court must accept the facts as alleged by plaintiff in its Complaint. As a result, defendant's Rule 12(b)(6) motion to dismiss is only successful as to Counts III and IV. The materials submitted by defendant in support of its alternative motion for summary judgment make clear, however, that plaintiff's allegations are completely without merit. Accordingly, defendant's motion for summary judgment is granted in full and the case is dismissed in its entirety.

DISCUSSION

A. Defendant's Motion to Dismiss

***2** Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. A movant is entitled to dismissal under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Lipsky v. Commonwealth United Corp.,* 551 F.2d 887, 894-95 (2d Cir.1976). Nevertheless, the complaint "must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Huntington Dental & Med. Co. v. Minnesota Mining & Mfg. Co.,* No. 95 Civ. 10959(JFK), 1998 WL 60954, at *3 (S.D.N.Y. Feb. 13, 1998). The Court must read the complaint generously and draw all reasonable inferences in favor of plaintiff, accepting the complaint's allegations as true. *Conley,* 355 U.S. at 46; *Hosp. Bldg. Co. v. Trustees of Rex Hosp.,* 425 U.S. 738, 740 (1976). Accordingly, the factual allegations set forth in the complaint do not constitute findings of fact by the Court, but rather are presumed to be true for the purpose of deciding the motion to dismiss. *See Emergent Capital Inv. Mgmt. v. Stonepath Group, Inc.,* 165 F.Supp.2d 615, 625 (S.D.N.Y.2001). "The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

1. The Contract Claims

Defendant BBVA moves to dismiss Dervin's contract claims (Counts I and II) on the grounds that the offer to add interest, as alleged in the Complaint, was unlawful under federal and New York state law and therefore unenforceable. BBVA argues that because the Complaint alleges that Dervin's account did not earn interest from 1994 through 1999, it is clear that the account in question was a checking account. Accordingly, because the Complaint alleges an offer to add interest to this account, BBVA argues that the offer must be construed as an offer to add interest to a checking account. Because both federal and New York state banking regulations prohibit the payment of interest on checking accounts, BBVA argues the alleged promise, if it occurred, was unlawful and therefore unenforceable.

Dervin does not dispute that its account should be classified as a checking account from 1994 through 1999. Nor does it dispute BBVA's analysis of the applicable banking laws. Rather, Dervin takes the position that it was unaware of any restrictions against earning interest on its account and that the promise to pay interest did not require BBVA to maintain the account as a checking account, *per se* . In other words, Dervin asserts that it was up to BBVA to take the appropriate steps to add interest to Dervin's account in a manner that complied with any applicable banking laws, including, if necessary, restructuring Dervin's account as a non-checking account.

***3** Federal banking regulations prohibit any member bank of the Federal Reserve System from paying interest on any demand deposit. Prohibition Against the Payment of Interest on Demand Deposits (Regulation Q), 12 C.F.R. § 217.3 (2004) ("No member bank of the Federal Reserve System shall, directly or indirectly, by any device whatsoever, pay any interest on any demand deposit."); *see also* 12 U.S.C. § 371a (2000). A demand deposit is "a deposit that is payable on demand, or a deposit issued with an original maturity or required notice period of less than seven days, or a deposit representing funds for which the depository institution does not reserve the right to require at least seven days' written notice of an intended withdrawal." 12 C.F.R. § 204.2. Examples of demand deposits include checking accounts, certified, cashier's, teller's, and officer's checks, traveler's checks, or money orders. *Id.* The State of New York Banking Department has adopted a similar rule, whereby "[n]o bank, trust company, private banker, investment company or New York branch or New York agency of any foreign banking corporation shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit or similar credit balance which is payable on demand." N.Y. Comp.Codes R. & Regs. tit. 3, § 20.1 (2003). As a foreign banking institution that operates a branch in New York, BBVA is subject to these restrictions. 12 C.F.R. § 217.1(c); N.Y. Comp.Codes R. & Regs. tit. 3, § 20.1; *see also* 12 U.S.C. 3105 (extending the authority of the Federal Reserve Board to federal and state branches and agencies operated by foreign banks).

If the Complaint specifically alleged that BBVA offered to pay interest to Dervin on a checking account, the Court would likely find such a promise to be illegal and unenforceable. [FN1] "Under both federal and [New York] state law, illegal agreements, as well as agreements contrary to public policy, have long been held to be unenforceable and void." *United States v. Bonanno Organized Crime Family of La Cosa Nostra,* 879 F.2d 20, 28 (2d Cir.1989). [FN2] As this Court recently noted,

FN1. It appears, however, that this would present an issue of first impression for the Court as to the enforceability of a contract to provide interest on a business checking account.

FN2. The question of whether an agreement is unenforceable because it is illegal or against public policy is ordinarily determined under the state law that governs the contract in question, *See Don King Prod., Inc. v. Douglas,* 742 F.Supp. 741, 756-58 (S.D.N .Y.1990); Restatement (Second) of Conflicts of Laws § 202 (1971) , in this case, New York law. Where an agreement contravenes a federal statute or regulation, however, the effect of such illegality is, at least initially, a question of federal law. *See Kelly v. Kosuga,* 358 U.S. 516, 519 (1959) ("Obviously, state law governs in general the rights and duties of sellers and purchasers of goods, and, while the effect of illegality under a federal statute is a matter of federal law, even in diversity actions in the federal courts after *Erie R. Co. v. Tompkins,* still the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the [statute.]") (citations omitted); *Sola Elec. Co. v. Jefferson Elec. Co.,* 317 U.S. 173, 176-77 (1942) ("When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.... [W]hether the parties to an agreement are *in pari delicto* is a question of federal, not state, law."); *Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co.,* 799 F.2d 265, 273 (7th Cir.1986) ; *Mitchell v. Flintkote Co.,* 185 F.2d 1008, 1011 (2d Cir.1951) (dismissing action because the contract sued upon contravened an executive order, noting that the executive order "states a federal rule of public policy and federal, not state, law governs its applicability," and that "[t]he 'checker-board' pattern imposed by *Erie R. Co. v. Tompkins* is necessarily unsuited to matters subject to federal regulation, and hence state law does not control the disposition of suits which, although they are between non-governmental parties and

> are brought in a federal court on the basis of diversity of citizenship, involve interpretation of application of federal law"). Even if federal law does not render unenforceable an agreement that contravenes a federal statute or regulation, however, it is still possible that an analysis under state law contract principles might require that result. *See Lloyd Capital Corp. v. Pat Henchar, Inc.,* 80 N.Y.2d 124, 128, 603 N.E.2d 246, 248, 589 N.Y.S.2d 396, 398 (1992) (applying New York law to determine whether a loan agreement, which violated Federal Small Business Administration regulations, was unenforceable where federal law did not provide for illegality as a defense to repayment of the loan). Furthermore, where, as here, the agreement in question also potentially violates non-federal law, an analysis of whether the agreement is unenforceable under the applicable state contract law is appropriate. Accordingly, the enforceability of a promise to provide interest on a demand deposit could turn on either federal or state law.

a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes.... Where the enforcement of private agreements would be violative of that policy it is the obligation of courts to refrain from such exertions of judicial power."

Wechsler v. Hunt Health Sys., Ltd., 216 F.Supp.2d 347, 354 (S.D.N.Y.2002) (quoting *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 83-84 (1982)).

The fact that a contract offends a federal statute or regulation does not, however automatically render it void or unenforceable. Unless the enforcement of a contract would require directing the precise conduct that a statute or regulation makes unlawful, "the courts are to be guided by the overriding general policy ... of preventing people from getting other people's property for nothing when they are purporting to be buying it." *Kaiser Steel Corp.,* 455 U.S. at 80 (quoting *Kelly v. Kosuga,* 358 U.S. 516, 520-21 (1959)) (internal quotations omitted). Thus, federal courts often look to (1) whether the statute or regulation in question explicitly provides that contracts in violation thereof are void; and if not (2) whether the interest in enforcement outweighs the public policy against enforcement. *See Resolution Trust Corp. v. Home Sav. of America,* 946 F.2d 93, 96-97 (8th Cir.1991) (collecting cases); *Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co.,* 799 F.2d 265, 273 (7th Cir.1986) ("The best generalization possible is that the defense of illegality, being in character if not origins an equitable and remedial doctrine, is not automatic but requires ... a comparison of the pros and cons of enforcement."); *cf.* 8 Williston on Contracts § 19:41 (4th ed. 1993) ("If a statute directly prohibits an agreement or sale, it is clear that the courts will not lend their aid to any attempt by the parties to enforce the agreement.... On the other hand, the rule that the courts will not grant aid to either party to an illegal agreement need not be applied where the legislature has not prohibited a certain category of transactions, but only requires that such a transaction be conducted in a certain fashion....").

***4** Similarly, under New York law, as a general rule, illegal contracts are unenforceable. *Benjamin v. Koeppel,* 85 N.Y.2d 549, 553, 650 N.E.2d 829, 830, 626 N.Y.S.2d 982, 983 (1995); *Lloyd Capital Corp. v. Pat Henchar, Inc.,* 80 N.Y.2d 124, 127, 603 N.E.2d 246, 247, 589 N.Y.S.2d 396, 397 (1992) ; 22 N.Y. Jur.2d, Contracts § 162 (1996). "However, the violation of a statute that is merely *malum prohibitum* [as opposed to *malum in se*] will not necessarily render a contract illegal and unenforceable. 'If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy ... the right to recover will not be denied." ' *Benjamin,* 85 N.Y.2d at 553, 650 N.E.2d at 830, 626 N.Y.S.2d at 983 (quoting *Rosasco Creameries v. Cohen* 276 N.Y. 274, 278, 11 N.E.2d 908, 909 (1937)); *Lloyd Capital,* 80

N.Y.2d at 127, 603 N.E.2d at 247, 589 N.Y.S.2d at 397; *see also United States Small Bus. Admin. v. Citibank, N.A.*, 94 Civ. 4259(PKL), 1997 WL 45514 at *9-10 (S.D .N.Y. Feb. 4, 1997). In balancing the requirements of public policy with the right to recover on a contract, New York law recognizes the principal that "forfeitures by operation of law are disfavored, particularly where the defaulting party seeks to raise illegality as 'a sword for personal gain rather than a shield for the public good." ' *Lloyd Capital,* 80 N.Y.2d at 128, 603 N.E.2d at 248, 589 N.Y.S.2d at 398 (quoting *Charlebois v. J.M. Weller Assocs., Inc.*, 72 N.Y.2d 587 at 595, 531 N.E.2d 1288 at 1292, 535 N.Y.S.2d 356 at 360 (1988)). Furthermore, "[a]llowing parties to avoid their contractual obligations is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law." *Id.; see also IHS Acquisition XV, Inc. v. Kings Harbor Care Ctr.*, 98 Civ. 7621(LBS), 1999 WL 223152 at *3 (S.D.N.Y. April 16, 1999) ("The matter of the enforceability of contracts that do not adhere to all regulations and statutes is a complicated issue [under New York law] that involves a multi-factor analysis [including] whether the statute in question is *malum prohibitum or malum in se;* what the underlying purpose of the statute is and for whose benefit it was passed, including what the legislative history reveals; whether the statute contains a criminal penalty or other sanction for violation of the law; whether the legislature envisioned that the contract would be null as a result of a violation of the statute; whether voiding the contract is out of proportion with the requirements of public policy; and whether the illegality defense is being used as a 'sword for personal gain' or a 'shield for the public good." ') (internal citations omitted).

The Court need not undertake this analysis, however, because the Complaint merely alleges that BBVA offered to add interest to Dervin's account; it does not allege that BBVA offered to provide Dervin with a *checking account or demand deposit* that would earn interest. BBVA's argument to the contrary fails for two reasons: First, the mere fact, alleged in the Complaint, that Dervin's account did not earn interest for five years does not necessarily establish that the account was a checking account. Second, and more importantly, the offer to add interest alleged in the Complaint does not specify or require that the account retain its status as a checking account. *Cf. Frouge Corp. v. Chase Manhattan Bank, N.A.*, 426 F.Supp. 794, 796-97 (S.D.N.Y.1976) (determining *on summary judgment* that the account sued upon was a checking account based on the parties' use of standardized form documents designed for checking accounts as well as the fact that no agreement to pay interest was made and no interest was paid on the account for ten years). There are any number of ways this alleged promise could have been performed legally, that is, without violating banking provisions discussed above, and there is no information in the Complaint that necessitates the reading advanced by defendant.

***5** Because the Court is limited on a Rule 12(b)(6) motion to dismiss to considering the law in light of the facts alleged in the Complaint, and because the Court must construe the Complaint in the light most favorable to the plaintiff, adopting defendant's interpretation of the Complaint would be inappropriate at this point. Furthermore, defendant's argument that illegality bars enforcement of the alleged agreement is properly regarded as an affirmative defense, which ordinarily would be pleaded in an answer, not a pre-answer motion to dismiss. *See* Fed.R.Civ.P. 8(c). A pre-answer motion to dismiss based upon an affirmative defense may be granted only where the facts giving rise to the defense are clearly apparent on the face of the complaint. *Pani v. Empire Blue Cross Blue Shield,* 152 F.3d 67, 74 (2d Cir.1998); *IHS Acquisition XV,* 1999 WL 223152 at *2; 5 Wright & Miller, Federal Practice and Procedure § 1277, at 468 (1990) ("When there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and nothing further can be developed by pretrial discovery or a trial on the issue, the recent cases seem to agree that the matter may be disposed of by a motion to dismiss."). This is not the case here, thus defendant's Rule 12(b)(6) motion to dismiss the contract claims is denied.

2. Counts III, IV and V: Fraudulent Misrepresentation, Conversion, and Unjust Enrichment

Based on essentially the same facts alleged in its breach of contract claims, Dervin seeks recovery on the alternative grounds of fraudulent misrepresentation, conversion, and unjust enrichment. With regard to Dervin's unjust enrichment claim, defendant argues that this claim must be dismissed because Dervin had no legal right to the accrued interest. This position relies on the argument, rejected by the Court, that the offer to apply interest to Dervin's account alleged in the Complaint was illegal and therefore unenforceable. Accordingly, BBVA's motion to dismiss Count V pursuant to Rule 12(b)(6) must also be denied. The Court need not, however, look beyond the four corners of the Complaint to determine that Count III, fraudulent misrepresentation, and Count IV, conversion, are without merit. Therefore, defendant's Rule 12(b)(6) motion to dismiss is granted as to Counts III and IV.

Defendant argues that plaintiff's fraudulent misrepresentation and conversion claims must be dismissed as a matter of law because they are duplicative of plaintiff's breach of contract claims. In general, to make out a claim of fraudulent misrepresentation, a plaintiff must show "(1) that [the defendant] made a misrepresentation (2) as to a material fact (3) which was false (4) and known to be false by [the defendant] (5) that was made for the purpose of inducing [the plaintiff] to rely on it (6) that [the plaintiff] rightfully did so rely (7) in ignorance of its falsity (8) to his injury." *Cohen v. Koenig,* 25 F.3d 1168, 1172 (2d Cir.1994) (quoting *Murray v. Xerox Corp.,* 811 F.2d 118, 121 (2d Cir .1987)). It is well settled under New York law, however, that "a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract." *Airlines Reporting Corp. v. Aero Voyagers, Inc.,* 721 F.Supp. 579, 582 (S.D.N.Y.1989) (quoting *Trusthouse Forte (Garden City) Mgt., Inc. v. Garden City Hotel, Inc.,* 106 A.D.2d 271, 272, 483 N.Y.S.2d 216, 218 (1st Dep't 1984)). Thus, a fraud claim based solely on the failure to perform a contractual promise fails to state a cause of action. *MCI Worldcom Communications, Inc. v. North American Communications Control, Inc.,* 98 Civ. 6818(LTS) 2003 WL 21279446 at *8 (S.D.N.Y. June 4, 2003); *Rotter v. Institutional Brokerage Corp.,* 93 Civ. 3578(JFK), 1994 WL 389083 at *3 (S.D.N.Y. July 22, 1994); *Airlines Reporting Corp. v. Aero Voyagers, Inc.,* 721 F.Supp. 579, 582 (S.D.N.Y.1989); *Cranston Print Works Co. v. Brockmann Int'l A.G.,* 521 F.Supp. 609, 614 (S.D.N.Y.1981). To maintain a distinct claim for fraud, "a plaintiff must allege: (1) a legal duty separate and apart from the contractual duty to perform, (2) a fraudulent representation collateral or extraneous to the contract, or (3) special damages proximately caused by the fraudulent representation that are not recoverable under the contract measure of damages." *Papa's-June Music, Inc. v. McLean,* 921 F.Supp. 1154, 1161 (S.D.N.Y.1996) (citations omitted).

*6 In response to defendant's argument on this point, plaintiff blithely states that it has a right to pursue alternative theories of liability in its Complaint. As the above case law makes clear, however, no such right exists for a redundant claim of fraud based solely on the breach of an alleged promise to perform future acts. Because Dervin's fraudulent misrepresentation claim does little more than reiterate its breach of contract claim and seeks the same $211,662.93 that is allegedly owed under the agreement to pay interest, it clearly fails under New York law. [FN3]

FN3. In a footnote, defendant argues that because plaintiff's fraudulent misrepresentation claim seeks only economic damages, it is also barred by New York's economic loss rule. This rule restricts plaintiffs "who have suffered 'economic loss,' but not personal or property injury, to an action for the benefit of their bargain. If the damages are the type remedial in contract, a plaintiff may not recover in tort." *Carmania Corp., N.V. v. Hambrecht Terrell Int'l,* 705 F.Supp. 936, 938 (S.D.N.Y.1989). Thus, even where a plaintiff has alleged a breach of duty by the defendant separate and distinct from the duty to perform a contract, a tort claim will nevertheless fail if the damages sought are recoverable in contract. *Id.* As recently noted by Judge Sweet, however, " '[t]he general rule under New York law is that economic loss is not recoverable under a theory of negligence or strict liability,' it is not clear that this same rule extends to tort claims sounding in fraud brought under New York law. The parties have not cited to any case in the New York courts applying the economic loss doctrine to an intentional tort, nor has one been found by the Court." *Computech Intern., Inc. v. Compaq Computer Corp.,* 02 Civ. 2628(RWS), 2004 WL 1126320 at *10 (S.D.N.Y. May 21, 2004) (quoting *American Tel. & Tel., Co. v. New York Human Res. Admin.,* 833 F.Supp. 962, 982 (S.D.N.Y.1993)). *But cf. Shred-It USA, Inc. v. Mobile Data Shred,* 222 F.Supp.2d 376, 379 (S.D.N.Y.2002) (dismissing fraud claim based on the economic loss doctrine but citing only to authority applying the doctrine to strict liability and negligence); *Orlando v. Novurania of America, Inc.,* 162 F.Supp.2d 220, 226 & n. 2 (S.D.N.Y.2001). Given the paucity of briefing by the parties on the issue and the absence of a definitive statement from the New York courts extending the doctrine to fraud claims, the Court declines to adopt the economic loss rule as an additional ground for dismissing Count III.

Similarly, plaintiff's conversion claim, predicated on defendant's allegedly wrongful seizure and possession of the accrued interest is merely duplicative of defendant's contract claim. *See Richbell Information Services, Inc. v. Jupiter Partners, L .P.,* 309 A.D.2d 288, 306, 765 N.Y.S.2d 575, 590 (1st Dep't 2003) ("We are not persuaded by [the] argument that conversion is a wrong qualitatively different from a mere breach of contract, so that it is not duplicative; such reasoning would resuscitate every redundant tort claim, regardless of its theory."); *Wolf v. National Council of Young Israel,* 264 A.D.2d 416, 417, 694 N.Y.S.2d 424, 425 (2d Dep't 1999) (dismissing conversion counterclaim based upon allegations that the plaintiff improperly deducted late fees from defendant's monthly mortgage payments in a manner not authorized by the mortgage agreements because the counterclaim did not stem from a wrong independent of the alleged breach of the mortgage agreements); *see also Wechsler v. Hunt Health Sys., Ltd.,* 94 Civ. 8294(PKL), 2004 WL 1801318 at *3 (S.D.N.Y. Aug. 11, 2004). [FN4] Accordingly, Counts III and IV are dismissed for failure to state a claim.

FN4. Defendant also argues that the conversion claim must be dismissed under Rule 12(b)(6) because Dervin lacked any right to the accrued interest. Because this argument also rests on plaintiff's contention that the alleged agreement to apply interest to Dervin's account was illegal and therefore unenforceable, it fails as an additional ground for dismissal at the 12(b)(6) stage.

B. Defendant's Motion for Summary Judgment

Although defendant's Rule 12(b)(6) motion for dismissal only succeeds as to Counts III and IV, its motion for summary judgment provides grounds for dismissing the Complaint in its entirety. Defendant's Local Civil Rule 56.1 Statement together with defendant's supporting declarations and documentary evidence establish that no promise to pay interest was, in fact, ever made to Dervin and that the addition of interest to the account was the result of a clerical error. Dervin's response fails to raise any doubt as to these facts, and accordingly, BBVA is entitled to judgment as a matter of law absolving it of liability on all counts contained in the Complaint.

1. The Summary Judgment Standard

"A party against whom a claim ... is asserted ... may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor...." Fed.R.Civ.P. 56(b). A moving party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Holt v. KMI-Continental Inc.,* 95 F.3d 123, 128 (2d Cir.1996). The substantive law underlying a claim determines if a fact is material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). When considering the motion, "the judge's function is not himself to weigh the evidence and determine truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249; *see also Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 11 (2d Cir.1986).

*7 In determining whether genuine issues of material fact exist, the Court must resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *See Anderson,* 477 U.S. at 255; *Holt,* 95 F.3d at 129. The moving party bears the burden of demonstrating that no genuine issue of material fact exists. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970); *Gallo v. Prudential Residential Serv. L.P.,* 22 F.3d 1219, 1223-24 (2d Cir.1994). "[T]he movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir.1995). Once the moving party discharges his burden of demonstrating that no genuine issue of material fact exists, the burden shifts to the nonmoving party to offer specific evidence showing that a genuine issue for trial exists. *See Celotex,* 477 U.S. at 324. "Conclusory allegations will not suffice to create a genuine issue. There must be more than a 'scintilla of evidence,' and more than 'some metaphysical doubt as to the material facts." ' *Delaware & Hudson Ry. Co. v. Conrail,* 902 F.2d 174, 178 (2d Cir.1990) (quoting *Anderson,* 477 U.S. at 252, and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)). In other words, "[t]he non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation of conjecture." *Western World Ins. Co. v. Stack Oil, Inc.,* 922 F.2d 118, 121 (2d Cir.1990) (quotations omitted). "A 'genuine' dispute over a material fact only arises if the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *Dister v. Cont'l Group,* 859 F.2d 1108, 1114 (2d Cir.1988) (citing *Anderson,* 477 U.S. at 248).

2. Defendant's Uncontroverted Rule 56.1 Statement

In support of its motion, defendant has properly submitted a statement of the allegedly undisputed facts on which it relies in accordance with the Local Civil Rules of the United States Courts for the Southern and Eastern Districts of New York. *See* Local Civ. R. 56.1. Defendant's Rule 56.1 Statement sets forth, *inter alia,* the following material facts: In December 1994, Dervin opened a business checking account at the New York branch of BBVA; this account did not earn interest from December 1994 through September 1999. (Def.'s 56.1 Statement ¶ 1-2.) In or about October 1999, BBVA transferred this account from its Private Banking Department ("Private Banking") to its Corporate Banking Department ("Corporate Banking"), (*Id.* ¶ 4); however, there was no oral or written agreement between BBVA and Dervin providing for the payment of interest on the Dervin Account. (*Id.* ¶¶ 7-8.) Rather, interest credits were added to Dervin's account as the result of a computer-entry error made by BBVA personnel in the course of transferring Dervin's account from Private Banking to Corporate Banking. (*Id.* ¶ 11.) This error led to BBVA crediting monthly interest payments to Dervin's account calculated at the rate of three percent over the Federal Reserve's Prime Rate, totaling $211,662.93 from October 1999 through July 2001. (*Id.* ¶¶ 9-10.) As of August 2001, Dervin had not withdrawn any of the interest from the account nor had it transferred any of the interest to a third party. (*Id.* ¶ 13.) At that time, BBVA deducted the interest credits from Dervin's account and notified Dervin that the interest credits had been added by mistake. (*Id.* ¶¶ 12, 14.)

***8** Dervin disputes several of these assertions in its Memorandum of Law. In particular, it claims that the interest credits were not a mistake but, rather, were agreed upon by the parties, (Pl.'s Opp. at 10); however, it has failed to include its own counter statement of material facts as required by Local Civil Rule 56.1(b). Furthermore, Dervin has not submitted any affidavits or documentary evidence supporting its opposition; nor has it asserted a need for discovery in order to contest defendant's motion.

Local Civil Rule 56.1(b) requires a party opposing summary judgment to "include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Importantly, if such a counter statement is not filed, the facts in the moving parties Rule 56.1 statement are deemed admitted by the opposing party. Local Civ. R. 56.1(c); *see Gubitosi v. Kapica,* 154 F.3d 30, 31 n. 1 (2d Cir.1998) (stating that because of non-movant's failure to file a counter Rule 56.1 statement, material facts in movant's Rule 56.1 statement are deemed admitted); *Maresco v. Evans Chemetics Div.,* 964 F.2d 106, 111 (2d Cir.1992) ("Because [non-movant] did not respond to [movant's Rule 56.1 statement], [Rule 56.1] requires that they be deemed to be admitted for purposes of summary judgment.") (footnote and internal quotations omitted); *Dusanenko v. Maloney,* 726 F.2d 82, 84 (2d Cir.1984); *Beckman v. United States Postal Service,* 79 F.Supp.2d 394, 396 n. 2 (S.D.N.Y.2000); *see also* Fed R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."). The Second Circuit, however, recently made it clear in *Giannullo v. City of New York,* 322 F.3d 139, 140-43 (2d Cir.2003), that a district court must ensure that there is support in the record for unopposed Rule 56.1 statements before accepting them as true. "[U]nsupported assertions must ... be disregarded and the record independently reviewed." *Id.* at 140; *see also Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.,* 373 F.3d 241, 244 (2d Cir.2004) (McLaughlin, J.) ("[I]n determining whether the moving party has met [its] burden of showing the absence of a genuine issue for trial, the district court may not rely solely on the statement of undisputed facts contained in the moving party's Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion.").

There is ample support in the record for BBVA's Rule 56.1 Statement. In particular, Juliet Portela, the BBVA employee allegedly responsible for the promise to pay interest on Dervin's account, states in her declaration:

> ***9** Dervin Corporation held an account in BBVA's Private Banking Department from 1994 until October 1999. I occasionally spoke to representatives of Dervin about their business checking account, number 9000001019. However, I never had any conversations or negotiations with Dervin concerning the terms and conditions of their account, including credit or debit interest. They never asked me to "add interest" to the account or to make any arrangements for the payment of interest. If they had made such a request, I would have referred them to my supervisors, because I did not have the authority to make any changes to customers' accounts.

(Decl. of Juliet Portela of Jan. 14, 2004 ¶ 3.). Furthermore, the source of the interest payments to Dervin is explained in the declaration of Ignacio Garijo-Garde, the Chief Operating office for BBVA's New York branch. Mr. Garijo-Garde states that in reassigning Dervin's account to Corporate Banking, the computer code for interest payable by the account holder for account overdrafts, or "debit interest," and the code for interest payable to the account holder for account deposits, or "credit interest," were mistakenly reversed. Thus, Dervin's account was assigned a debit interest rate of zero percent, which would ordinarily be the credit interest rate for a business checking account, and a credit interest rate of prime plus three percent, which would ordinarily be the debit interest rate for a business checking account. As a result, beginning in October 1999, the computer system at BBVA generated account statements reflecting interest payments to Dervin at a rate of approximately eleven percent. (Decl. of Ignacio Garijo-Garde of Jan. 14, 2004 ¶ ¶ 8-9.) In contrast, during the period in question from 1999 through 2001, interest-bearing money market accounts for comparable customers paid at a rate of approximately five percent. (*Id.* ¶ 10.) These declarations, along with the documentary evidence submitted by BBVA, including bank records, account statements, and correspondence between the parties, provide overwhelming support for the statements in Defendant's 56.1 statement.

Accordingly, BBVA has met its burden of establishing that there is no genuine issue of material fact to be tried in this case. It is clear from BBVA's submissions that there was no offer or agreement by BBVA to pay interest on Dervin's account; the account remained a business checking account throughout its existence; and the interest payments on the account resulted from a clerical error. Plaintiff, in response, has failed to raise any genuine issue of material fact, and, indeed, by failing to file a Rule 56.1 statement, has admitted the facts put forth by defendant's statement. Because there was no agreement or representation that interest would accrue on the account, and because, as discussed above, interest may not lawfully be paid on a checking account, Dervin has no legal interest in the accrued interest payments. Furthermore, under New York law a bank is entitled to recover credits mistakenly applied to an account, provided the payee has not changed position in detrimental reliance upon the mistaken credit. *See Bank Saderat Iran v. Amin Beydoun, Inc.,* 555 F.Supp. 770, 773-74 (1983) ("Under New York law, a party who has made a mistaken payment to another based upon a unilateral mistake of fact may recover the payment unless the payee has changed his position to his detriment in reliance upon the mistaken payment."); *Mfrs. Trust Co. v. Diamond,* 17 Misc.2d 909, 909-10, 186 N.Y.S.2d 917, 919 (1st Dep't 1959); *Turetsky v. Morris Plan Indus. Bank of New York,* 22 N.Y.S.2d 514, 515 (2d Dep't 1936); *Citibank, N.A. v. Warner,* 113 Misc.2d 748, 750, 449 N.Y.S.2d 822, 823-24 (Sup.Ct.1981). There has been no such detrimental change of position by Dervin. *Compare Bank Saderat Iran,* 555 F.Supp. at 774 (finding detrimental reliance where payee, after receiving a mistaken payment of $24,950 from bank, sent $24,950 in merchandise to a customer that subsequently went out of business and could not pay for the goods), *with Citibank,* 113 Misc.2d at 750, 449 N.Y.S.2d at 824 (no detrimental reliance where payee wrote multiple checks to her relatives drawing on mistakenly credited funds). As a result, defendant is entitled to summary judgment as to each of the counts in the Complaint.

CONCLUSION

***10** For the foregoing reasons, defendant's Rule 12(b)(6) motion to dismiss is GRANTED as to Counts III and IV of the Complaint and DENIED as to Counts I, II and V. Defendant's motion for summary judgment, however, is HEREBY GRANTED as to ALL COUNTS in the Complaint so that the action is HEREBY DISMISSED in its ENTIRETY.

SO ORDERED.

2004 WL 1933621 (S.D.N.Y.)

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